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THE NEW YORK HOME RULE AMENDMENT IN THE COURTS

It is doubtful whether the tenets of any of the great schools of jurisprudence find material support in those recent decisions of the New York courts wherein was concerned the division of governmental functions between the State and the municipality. Strangely enough, before the adoption of the so-called Home Rule Amendment to the Constitution, there could be found in the reports a judicial tendency toward a fuller recognition of municipal power.¹ With the relaxation of the organic law,² we find strong evidence of a contrary tendency.³ Nor is more consideration shown for the theories of the sociological jurists than for those of their historical confrères. With the constant and pronounced trend of population toward the cities and the resultant increase not only of the complexities of local problems but of the need for adequate and efficient municipal government, we find the

¹ See *e.g.*, *People v. Raymond*, 37 N. Y. 428, 431 (1868); *People, ex rel. Bolton v. Albertson*, 55 N. Y. 50, 56 (1873); *Rathbone v. Wirth*, 150 N. Y. 459, 468, 45 N. E. 15 (1896), where Judge Gray, considering the import of Article X, Sec. 2 of the State Constitution, at the time the only provision relating to the selection of local officers, said, "It ought not to require much of argument to show the importance of this clause in our Constitution or what its presence means for our political institutions. * * * It means the right to choose their local officers, in all its reality; or it means nothing." And Judge O'Brien, in his opinion in the same case, 487, "The true interpretation, scope and meaning of this section of the Constitution has been frequently passed upon by this court, and it has been uniformly held that its obvious purpose was to secure to the people of the cities, towns and villages of the state the right to have the local offices administered by officers selected by themselves. It was designed to protect and give force and effect to the principle of local self-government which has always been regarded as fundamental in our political institutions."

In the leading case of *People, ex rel. Met. St. Ry. Co. v. Tax Comrs.*, 174 N. Y. 417, 67 N. E. 69, *aff'd.* 199 U. S. 1, the Court devoted four pages of its opinion to an illuminating discussion of the history of the principle of local government in matters of local concern, of the extensive application of this principle in the American colonies, of the resultant necessity of interpreting the Constitution in this light, and of the inviolability of the principle generally. See also *Peo., ex rel. Town of Pelham v. Village of Pelham*, 215 N. Y. 374, 109 N. E. 513 (1915).

² N. Y. Const. Art. XII, §§ 2-7, as amended.

³ See cases discussed *infra*.

courts jealously resisting any assumption of power by local bodies. As the social considerations become more compelling, as the pressure of public opinion increases, there is encountered an apparent reversal of the judicial attitude. Government, one might deduce, should be territorial rather than representative, and no longer can be accepted at face value the definition of a municipal corporation as "a political or governmental agency of the State, which has been constituted for the local government of the territorial division described and which exercises by delegation, a portion of the sovereign power for the public good."⁴ In seeking explanation of these enigmatical decisions, one cannot well overlook the potency of what may be termed personal factors, of the private view-points of individual judges, of their innate distrust of the wholesomeness of municipal administration. It is of course, not suggested that these factors have been permitted to counterbalance the courts' concept of those weightier considerations of social need and public good.

In the State of New York, with a large metropolis overshadowing in importance, the remainder of the State, it was inevitable that "home rule" legislation should appear on the statute books. Until late in 1923, determined and persistent opposition successfully forestalled this result. Even after the people, both through the legislature and at the polls, had stated their purpose to permit local legislation in respect of the property, affairs and government of cities, we find eminent counsel strenuously urging the invalidity of the Constitutional Amendment.⁵ One argument much insisted upon, was that, since, between the original passage by the legislature of the amending resolution and its repassage by the succeeding legislature, two words had been changed by a prior proposed amendment, the repassed resolution was amendatory of a different constitution from that sought to be affected by the resolution as originally adopted. The two words, inserted solely in the interests of clarity, were correctly found by the Court to be not of the substance of the provision. The other, and more serious contention, was that since the amendatory resolutions had been entered in the legislative journals not in full, but by title and reference only, the attempted amendment was abortive. The

⁴ *MacMullen v. City of Middletown*, 187 N. Y. 37, 41, 79 N. E. 863, (1907).

⁵ *Browne v. City of New York*, 241 N. Y. 96, 149 N. E. 21 (1925).

Appellate Division valiantly supported this contention,⁶ despite the facts that practically every amendment to the Constitution and some two hundred local laws would thereby be invalidated.⁷ The Court of Appeals, more salutary than valiant, was of opinion that the word "enter" did not require entry *in extenso*, but entry by sufficient reference merely.

Though the Amendment successfully survived the attack upon its validity, the local laws passed by virtue of it and its statutory concomitant, the City Home Rule Law,⁸ have not fared so well in the courts. The same *Browne* decision is the leading case upon the construction of the legislation. In that case, the City of New York adopted local laws authorizing it to acquire, and operate, buses upon the city streets. Taxpayers' actions were brought to enjoin the city and its officers from disbursing public funds in the administration of these local laws. The Court of Appeals held the local legislation invalid. From an examination of its prior decisions, it readily found that the City of New York had been consistently denied permission to engage in the business of a common carrier,⁹ both by the courts and the legislature. Starting with the premise that there had previously been no such power in the City, the Court examined the Home Rule Amendment and Act and failed to find such power there conferred. The Court, in passing, said (and this is indicative of its attitude), "The title of the act must be classed as a misnomer if it has given currency to the belief that cities have been emancipated from the power of the Legislature in respect of every legitimate subject of local interest or concern. Nothing of the kind has been accomplished or attempted."¹⁰ Continuing, the Court proceeded to enumerate five classifications within which local legislation, to be valid, must necessarily fall. Though the wording of the statute is closely followed, it might not be amiss to here repeat those

⁶ *Browne v. City of New York*, 213 App. Div. 206, 211 N. Y. Supp. 306 (1st Dept., 1925).

⁷ See brief of Home Rule Commission, *amicus curiae*.

⁸ Laws of New York, 1924, Chap. 363, as amended, constituting Chap. 76, Consolidated Laws.

⁹ *Brooklyn City R. R. Co. v. Whalen*, 191 App. Div. 737, 182 N. Y. Supp. 283, *aff'd*, 229 N. Y. 570 (2nd Dept., 1920), and *Schafer v. City of New York*, 206 App. Div. 747, (leave to appeal denied by Court of Appeals, July 15, 1923), were among the cases cited for this proposition.

¹⁰ *Supra*, note 5, 241 N. Y. 96 at 119.

classifications, if for no other reason than that they have been quite uniformly adhered to in subsequent decisions.

"They (the local laws) must touch a city in its property, affairs or government in one or more of certain enumerated ways, *i.e.*, by 'relating' (1) 'to the powers, duties, qualifications, number, mode of selection and removal, terms of office' or 'compensation' of 'officers and employees of the city,' or (2) 'the transaction of its business, the incurring of its obligations,' or 'the presentation, ascertainment and discharge of claims against it' or (3) 'the acquisition, care, management and use of its streets and property,' or (4) 'the wages, salaries, hours of labor, etc., of employees of its contractors and subcontractors,' or (5) 'the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health.'" ¹¹

In the *Browne* case it was said that the power there claimed by the city had to find justification in subdivisions (1), (3) or (5). None of these was considered sufficiently broad to authorize a departure from what the Court considered a well-defined legislative policy in denial of the City's contention.

It is quite unfortunate that in the first case to reach the Court of Appeals there was inseparably involved with the question of the validity of local legislation, the further and oft-mooted question of the wisdom of municipal operation of transit facilities. Many of the statements by the Court were, no doubt, made with the two-fold question in mind. From an examination of the case, it would seem that the decision could have been reached upon technical grounds (for the municipal legislature proved inexperienced) and the indication of the Court's attitude toward the whole subject of home rule in the light of the recent legislation could well have been deferred to a more opportune occasion. In fact, the Court, in the closing words of its opinion plainly stated that no attempt was being made to mark with precision the limits of valid local legislation.¹² This statement, however, came too late—the Court had spoken—and future citations refer not to the closing reservations but to the classifications before mentioned and to remarks properly applicable only to the peculiar circumstances of the case.

¹¹ *Ibid.*

¹² *Ibid.* 125.

But, aside from these considerations, what may be said of the general attitude of the Court? The State Constitution had been recently amended to allow of greater independence in municipal affairs; the City Home Rule Law, declaratory of the Amendment and of its purpose had recently been enacted. Accordingly, a relaxation by the courts might well be expected. Nevertheless it was found that the legislative intent that the City of New York should not become a common carrier still persisted. This intent is said to have been often reiterated; still, it is common knowledge that for many years it had been the legislative intent that the governmental powers of cities, especially New York City, should not be extended. The newer legislative intent was professedly "to enable cities to adopt and amend local laws for the purpose of fully and completely exercising the powers granted to cities by the terms and spirit of such article (*i.e.*, the Home Rule Amendment to the Constitution.)"¹³ Then too, it is worthy of note that the legislature, evidently to guard against a flood of clearly invalid legislation, specifically excepted nine instances from the scope of its action, but made no reference to the matters here considered.¹⁴

The *Browne* case, itself of prime importance, acts also as an introduction to an interesting line of cases, few in number because of the limited period covered, but supplementing by variety their lack in that respect. One of the two other cases bearing upon the subject in which the Court of Appeals has written an opinion, is *Matter of McCabe v. Voorhis*,¹⁵ in which a voter applied for a peremptory order of mandamus to compel the New York City board of elections to omit from the ballot for the next general election a local law having as its titular object the prevention of an increased fare on rapid transit lines without the consent of the electorate. The proposition was regularly adopted by the municipal assembly and transmitted to the board of elections, a board charged, says the Court, with the "ministerial duty of submitting local laws to the vote of the people."¹⁶ Continuing, in the course of a discussion of the rights and duties of this ministerial board, we find the Court saying, "the question next arises

¹³ City Home Rule Law, *supra*, note 8, Sec. 30.

¹⁴ *Ibid.* Sec. 21.

¹⁵ 243 N. Y. 401, 153 N. E. 849 (1926).

¹⁶ *Ibid.* 410.

as to the public duty of the board of elections. Unquestionably it must determine for itself whether the law is in form a local law and in fact properly transmitted to the board."¹⁷ This board, we are told, may refuse to submit to the people a proposition "not on its face such a local law as should be submitted for the approval of the electors"¹⁸—a truly anomalous situation, a body charged with a "ministerial duty" determining the limits of legislation. As has been well stated in a recent Appellate Division decision,¹⁹ and as was recognized in the *McCabe* case,²⁰ the determination by the courts of questions of this character in the necessary haste of disposing of pre-election contests is, to say the least, hazardous. If this be true of judicial action, how much more so is it true of the action of a body ill-equipped to exercise judicial functions?

Passing now to the consideration of the validity of the local law involved, we find two grounds of objection. The purpose of the law as summarized in the title was to prevent an increased fare upon rapid transit lines without the approval of the electorate. In terms, however, the law forbade the adoption by the board of estimate of any resolution permitting changes in franchises or operating contracts that would result in an increased fare, that would grant to any company a preferential, bonus or subsidy or that would release a company from any of the public service obligations of a franchise or contract, without the consent of the people of the city. Once again the local legislators had been imprudent and the Court could have contented itself with restraining the submission of the proposition in the form proposed. But the Court went further, and though at the time declining to decide whether the local legislation was invalid in that it related to matters other than the property, affairs or government of cities, it did hold the law invalid as an unauthorized attempt to supersede state legislation. Contracts for the effectuation of Transit Commission plans were required by State law to be approved by the board of estimate or other local authority.²¹ The electorate

¹⁷ *Ibid.* 411.

¹⁸ *Ibid.*

¹⁹ *Bareham v. City of Rochester*, 221 App. Div. 36, 222 N. Y. Supp. 141 (4th Dept., 1927).

²⁰ *Supra*, note 15, 4.

²¹ Public Service Commissions Law, § 12, as amended by Laws, 1925, Chap. 641.

was not, said the Court, a local authority. Therefore, legislation which would divest the board of estimate of plenary power must fall. But the entire argument of the Court was based upon the assumption that the law providing for a transit commission in cities of a million or more inhabitants²² was a general, and not a special, city law. Support for this construction was found in the leading *McAneny*²³ case, decided, however, before the adoption of the Home Rule Amendment and in reliance upon an ill-considered line of cases holding generality in the terms of a statute to be the test of generality in effect. The Amendment, as has been well brought out in a lower court decision,²⁴ prohibits State legislation "special or local either in its terms or in its effect."²⁵ When the State legislation was adopted, the City of New York was, and still is, the only city of the State with a population of more than a million. The prospects of additions to the class were, and still are largely visionary. It is submitted that the adoption of the legislation in this form was but an attempt to take advantage of the New York rule of construction and to accomplish by indirection what the Constitution, even prior to amendment, might have been found to prohibit. Once again, as in the *Browne* case, the quarrel is not with the result *as such*, but with the unneeded arguments of the Court, so indicative of its attitude and so avidly seized upon by other and equally unsympathetic courts.

The *Browne* and *McCabe* cases have thus been dealt with at some length because subsequent decisions upon the subject, no matter what their holding, are professed to be based upon the "principles" of either or both of these cases.

An interesting case is *Schieffelin v. Berry*,²⁶ which involved

²² Pub. Serv. Com. L. § 4a; L. 1921, Chap. 134.

²³ *Matter of McAneny v. Board of Estimate*, 232 N. Y. 377, 134 N. E. 187 (1922).

²⁴ See discussion of this matter in *Schieffelin v. McLaughlin*, 127 Misc. (N. Y.) 56 (1926) where it was held that a State statute, applying in terms to police commissioners of all cities of the State, but which in effect could reach but one, was "local, special and unconstitutional" under N. Y. Const. Art. XII, § 2, as amended. The Court reviews and criticizes, in the course of its opinion, the leading decisions upon the matter of interpretation.

²⁵ N. Y. Const. Art. XII, § 2, as amended.

²⁶ 217 App. Div. 451, 216 N. Y. Supp. 367 (1st Dept., 1926), *aff'd* without opinion by the Court of Appeals, Pound and Crane, J. J., dissenting, 243 N. Y. 603, 154 N. E. 623 (1926).

the validity of amendments to the New York City Charter provisions for an employees' retirement system. These provisions fixed retirement ages dependent upon the character of the work performed and directed the payment of compensation approximating one-half of the employee's average annual salary for the ten years preceding his retirement.²⁷ Half the compensation was paid by the city; the other was provided by the employee's contributions during his working years. The State legislature, in 1921, included within the City retirement system, the recording officers and clerks of the five counties within Greater New York.²⁸ In 1925, by local law, the City reduced the retirement age of all classes five years and fixed as the measure of the pension, the employee's average earnings for his last five working years. A taxpayer sued to restrain payment out of the retirement fund to an ex-Mayor of the City. The injunction was granted. Though the Court admitted that payments made under the system would be for a city purpose, still no proper occasion for local legislation had been presented, it said, because the legislation attempted affected the "property, affairs or government of a county." Though the Legislature had expressly included county employees, relatively few in number, within the City retirement system, the local action must be frustrated and the legislation fall *in toto*, because in the Home Rule Act, the Court could find a legislative intent to continue county government.²⁹ This intent, we must assume, was sufficiently strong to effect a recapture, as it were, of a matter already delegated to the city.

A case somewhat related is *Schieffelin v. Leary*,³⁰ a taxpayer's suit protesting against an increase in annual salary, granted to the President Justice of the Municipal Court of the City of New York. There is a salary prescribed for justices in the New York City Municipal Court Code.³¹ This salary is paid by the City of New York from moneys raised by local taxation. Two local laws were adopted permitting the municipal authorities to fix with

²⁷ §§ 1700-1725, Laws 1901, Chap. 446, as amended.

²⁸ Laws 1921, Chap. 271.

²⁹ City Home Rule Law, *supra*, note 8, § 21 (9), which prohibits local legislation superseding State statutes if the local law "Applies to or affects any provision of law relating to the property, affairs or government of a county or counties."

³⁰ 219 App. Div. 660, 220 N. Y. Supp. 587 (1st Dept., 1927).

³¹ Laws 1915, Chap. 279, as amended by Laws 1920, Chap. 829, § 3.

certain exceptions, salaries of those paid out of the City Treasury. Pursuant to those laws, defendant was regularly voted an increase. The Court set aside the City's action on the ground that a municipal court justice was a State officer. This proposition was predicated upon a decision of the Court of Appeals in 1876, holding that the City was without power to reduce the salary of a clerk of the old District Court of the City of New York.³² It is strange that this case should be considered a binding authority after the adoption of the Home Rule Amendment, and despite the fact that in the much respected *Browne* case, the Court of Appeals had included within its classifications local legislation relating to "the incurring of its (the municipality's) obligations."³³ It is difficult also to follow the Court's contention that a State function was here being usurped, for in the Constitution, as amended, we find that "all elections of city officers, including supervisors and judicial officers of inferior local courts" shall be held in odd-numbered years when State offices are not to be filled.³⁴ While speaking of elections, it might be interesting to advert for a moment to the opinion in *People ex rel. Casler v. Eysaman*,³⁵ where the Court after finding that a proposition presented to the voters had not been adopted the prescribed number of days prior to the election and was therefore irregular, proceeded to say that even had the proposition been timely, it could not have been voted upon at the 1924 election because at that time State officials were to be elected. Aside from the fact that no such restriction appears in the Constitution or Home Rule Act, one might ask, if the *Leary* case be correct, when, if ever, local laws could be submitted to the electorate. Local judicial officers are elected in odd-numbered years; they are "State officers;" the gubernatorial election occurs in the even numbered years; all the general elections seem closed to local propositions. It is indeed questionable that it was the legislative intent that local propositions be not voted upon at the next succeeding election. From the very nature of local legislation, one, it seems, could logically infer that delay, in many cases, would successfully thwart the purpose of the entire scheme. And again, when we

³² *Whitmore v. Mayor*, 67 N. Y. 21 (1876).

³³ *Supra*, note 5 at 119.

³⁴ N. Y. Const. Art. XII, § 6, as amended.

³⁵ 126 Misc. 853, 214 N. Y. Supp. 416 (Sup. Ct. Herkimer Cty., 1926).

find that special elections, always expensive matters, may be called for action upon such propositions, the position of the Court seems hardly tenable.³⁶

Further reference to decisions invalidating local legislation would serve no useful purpose. Of the cases construing the Amendment and Act, but two have fully upheld the local laws attacked.³⁷ In these cases, as was stated during the course of the opinions, no extension of municipal power had been attempted. The Commissioner of Accounts of New York City had long had the power to subpoena witnesses and records for examination, nor could it be properly urged that his power was unconstitutional in that he was authorized to subpoena officials of the counties within the City.³⁸ In the other case, the authority of the Commissioner of Parks to collect rentals for the temporary use of public lands was declared to have been long recognized.³⁹

There is one decision in New York, however, which is believed to have given expression to the true legislative intent.⁴⁰ For the first time, we find a court citing and applying those provisions of the Home Rule Act in which the Legislature concisely stated its intent and directed that a liberal construction be accorded the provisions of the Act.⁴¹ The Court not only cited these sections, but applied them, holding valid the scheme for the readjustment of the municipal government of Rochester. The opinion here referred to, that of the Appellate Division, appeared in May of this year. The case was shortly heard in the Court of Appeals, and in mid-summer appeared its decision,⁴² written by a man previously a member of the law department of the City of New York and who had, as such, appeared for the City in

³⁶ See City Home Rule Law, *supra*, note 8, §§ 15-20 with regard to popular action upon local propositions.

³⁷ Matter of McLaughlin, 124 Misc. 766, 210 N. Y. Supp. 68 (Sup. Ct. N. Y. Cty., 1926), and Tobin v. Hennessey, 130 Misc. 226, 223 N. Y. Supp. 676 (Sup. Ct. Bronx Cty., 1927).

³⁸ Matter of McLaughlin, *supra*, note 37.

³⁹ Tobin v. Hennessey, *supra*, note 37 at 227.

⁴⁰ Bareham v. Rochester, *supra*, note 19.

⁴¹ City Home Rule Law, § 30, *supra*, note 13; also § 31, which directs, "This chapter shall be construed liberally. The powers herein granted shall be in addition to all other powers granted to cities by other provisions of law."

⁴² Bareham v. Rochester, 246 N. Y. 141 (July, 1927), opinion per O'Brien, J.

prior similar proceedings. The opinion begins, liberally enough, with a review of the legislative purpose. The sections of the Home Rule Act above referred to,⁴³ for the first time were mentioned by the Court of Appeals, but, unfortunately, not applied. That part of the local legislation which was believed to supersede sections of the Election Law was held invalid because the section numbers, etc., of the supposedly general provisions had not been specifically mentioned for repeal in the local enactments. The section of the Act upon which the Court relies, from its terms, appears to be directory merely and inserted solely for the sake of clarity.⁴⁴ Nevertheless, the Court invalidated the legislation and once more a decision reveals what may be termed the prevailing judicial attitude.

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⁴³ *Supra*, note 41.

⁴⁴ City Home Rule Act, *supra*, note 8, § 12 (1). "Any local law adopted pursuant to this chapter *may* specify any provision of an act of the legislature by reference to chapter number (etc.), which provision relates to the subject matter of such local law and does not in terms and in effect apply alike to all cities * * * and upon the taking effect of such local law, such provision * * * shall cease to have any force or effect in such city * * *."